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NO. 80-1822

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HAROLD ANCLE THORNBERRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. MAY A FEDERAL PROSECUTOR CALL WITNESSES TO THE STAND WHEN IT IS KNOWN IN ADVANCE THAT THOSE WITNESSES WOULD VALIDLY INVOKE THEIR FIFTH AMENDMENT PRIVILEGE TO ALL QUESTIONS ASKED AND THE GOVERNMENT'S SOLE PURPOSE IN CALLING SUCH WITNESSES IS TO INFORM THE JURY OF THE FACT OF THEIR CLAIM OF PRIVILEGE?

B. MAY A FEDERAL PROSECUTOR THEN COMMENT UPON THOSE WITNESSES' REFUSALS TO TESTIFY IN HIS CLOSING ARGUMENT AND SUGGEST THAT INFERENCES SUPPORTING AN ELEMENT OF HIS CASE ARISE FROM THEIR REFUSAL TO TESTIFY?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

PLAINTIFF: UNITED STATES OF AMERICA

DEFENDANTS: HAROLD ANCLE THORNBERRY
HARRY NORMAN SEITER
HOWARD NEWTON DONNELLY
BROWN MARTIN NOEL
SANFORD ALLEN RUE
FRED MESSER
RODNEY CHALK
EDWARD SODEN

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Judgment and Commitment Order Criminal Action No. 78-26 filed in the United States District Court for the Eastern District of Kentucky on November 20, 1978.

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Order of the United States Court of Appeals for the Sixth Circuit, dated April 1, 1981.

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NO. ————

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HAROLD ANCLE THORNBERRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Harold Ancle Thornberry, by his Attorney, prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 24, 1981, and April 1, 1981.

OPINIONS BELOW

No written Opinion regarding the issues in this case was filed or published by the United States District Court for the Eastern District of Kentucky. The oral ruling of the Court is at pages 17a-19a of this Appendix. The Opinion of the Sixth Circuit Court of Appeals, which affirmed the Judgment of the District Court, is at Pages 3a-7a of this Appendix and has not been officially reported to date. The Order of the Sixth Circuit Court of Appeals denying

a timely filed Petition for Rehearing was entered April 1, 1981, which Order may be found at Page 8a of this Appendix.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals for the Sixth Circuit and the date of its entry is February 24, 1981, (App. 3a).

An Order of the Court of Appeals denying a timely Petition for Rehearing was entered April 1, 1981 (App. 8a).

Jurisdiction of this Court is invoked under 28 USC § 1254 (1).

CONSTITUTIONAL PROVISIONS

AMENDMENT FIVE:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

AMENDMENT SIX:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

UNITED STATES SUPREME COURT STANDARDS

STANDARD 513(a):

> *"Comment Or Inference Not Permitted.* The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not proper subject of comment by judge or counsel. No inference may be drawn therefrom."

STANDARD 513(b):

> *"Claiming Privilege Without Knowledge Of Jury.* — In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury."

STATEMENT OF THE CASE

On May 3, 1978, Harold Thornberry and seven Co-Defendants were first indicted in the Eastern District of Kentucky. A three count superseding Indictment was filed on May 24, 1978. Count One charged Thornberry and the others with violating Title 18, Section 371, United States Code, "Conspiracy to commit an offense against the United States." Count Two charged Thornberry and six Co-Defendants with violating Title 18, Section 1955, United States Code, "Prohibition of illegal gambling businesses." Count Three charged Thornberry and three Co-Defendants with violating Title 18, Section 1511, United States Code, "Obstruction of State or Local Law Enforcement." As the result of a Motion to Elect filed by the Defendants, the United States elected to proceed under Count Three only for its first trial.

The Indictment, in Count Three, charged Harold Thornberry, Howard Donnelly, and Brown Noel with operating or managing an illegal poker game at 616 Washington Street in Covington, Kentucky. That gambling business allegedly involved five or more persons, including Sanford Rue, Fred Messer, Rodney Chalk, and Edward Soden, four Co-Defendants who were named only in the first two counts. It also allegedly involved substantially continuous operation for more than thirty days and had gross revenue of $2,000.00 in any single day. It was charged that Thornberry, Donnelly and Noel conspired with Harry Seit-

er, a Covington policeman, to keep the gambling business secret from other local and state law enforcement personnel and to prevent enforcement of Kentucky gambling laws.

Trial on Count Three was begun on September 6, 1978, before a Jury in Covington, Kentucky, but ended in mistrial. Retrial on Count Three took place in London, Kentucky, before the Honorable Eugene Siler, District Court Judge, beginning on October 16, 1978.

The Government presented players who testified that from February, 1977, until March 23, 1978, a regular poker game was conducted in an apartment at 616 Washington Street. This apartment building was owned by Harold Thornberry. Thornberry had rented it to Brown Noel's wife in January, 1977, for $150.00 per month. The windows of the apartment were boarded over and the door had a peephole. Poker was played with a $2.00 opener, and a $2.00 limit on raises.

The game would have a dealer who would not play when dealing. The dealer would cut quarters from the pots and place them in a cigar box. Witnesses identified Edward Soden, Rodney Chalk, Fred Messer, and Sanford Rue, as having been dealers. Brown Noel and Howard Donnelly answered the door and telephone, served food and beverages to the players, and received the contents of the cigar box. Neither Harold Thornberry nor Harry Seiter were identified as having ever been present at the game. Howard Donnelly told one player that the game was "protected."

Noel and Donnelly testified that the money cut was only for rent, utilities, dealers, food and beverages, and asserted that the game was legal under a Kentucky Attorney General's Opinion. There was evidence that from March of

1977, various police agencies including the Covington Police, the Kentucky State Police, and the F.B.I. had all been aware of this game, but that there was confusion over the applicability of Kentucky gambling statutes to it.

The Government presented testimony that Howard Donnelly had once been seen giving money to Harold Thornberry. They also proved that after the F.B.I. had searched 616 Washington and had served the Warrant return on Thornberry, Harry Seiter had visited him to inquire into what the F.B.I. had found.

The case against Harold Thornberry also rested upon some conversations he had in March of 1978, which were surrepticiously recorded by a paid undercover "consultant" who had befriended Thornberry. In them, Thornberry bragged that he had the Police Department in his pocket, that he had paid for promotions of unnamed Covington Police and Fire Officers, that he had gotten the City Commissioners elected, that he had gotten Harry Seiter promoted and would have him made Police Chief, and that Donnelly and Noel were paying him $450.00 in addition to his rent which he used to pay off certain unidentified City Commissioners and policemen. Harold Thornberry testified in his defense and denied the truth of these statements. He produced business records and testimony to the effect that, in reality, he had received only his rent for the premises.

As part of their case in chief, the United States announced that they intended to call the four alleged "dealers", Edward Soden, Fred Messer, Sanford Rue, and Rodney Chalk, as witnesses. All four men were still under indictment at that time. Outside of the Jury's presence, their Attorney informed the Court that they all would, if called, assert their Fifth Amendment privilege to remain silent

(App. 10a). The United States Attorney informed the Court that he was aware of that fact but was entitled to call them so as to inform the Jury of their assertions of privilege (App. 10a). Defense counsel objected to calling the four men for the sole purpose of having them invoke their privilege before the Jury and requested voir dire (App. 11a). Outside of the Jury's presence, Fred Messer was briefly interrogated by the Prosecutor and indicated he would "take the Fifth" to all questions asked (App. 12a-13a). The United States Attorney then stipulated that Allen Rue, Ed Soden, and Rodney Chalk would likewise, if called, assert their Fifth Amendment privilege to all questions asked (App. 13a). The Prosecutor made no challenge to the validity of their assertions of privilege. The Government asserted that they had a duty, under Sixth Circuit case law, to call these witnesses and to then have them invoke their privilege before the Jury. (App. 16a). The Trial Court, recognizing a direct conflict of case law between the Federal Circuits, ruled that Sixth Circuit case law permitted the Government to call those witnesses (App. 17a-19a). Over objection, all four Co-Defendants were called and invoked their privilege before the Jury (App. 27a, 30a-33a). An admonition was given (App. 29a-30a) Defendants' Motions for mistrial were overruled (App. 34a).

In closing argument, the Prosecutor informed the Jury that the "5 person requirement" of an illegal gambling business can be satisfied by "dealers," among others (App. 35a). The Prosecutor also commented upon the refusal of the four alleged "dealers" to testify, stating:

> "You get to the dealers. Now the United States brought these dealers in here and put them on the stand. But we didn't get anything out of them. And

you are not to infer, you know, that that is anything against the Defendants. But we wanted to put all the people on that we could that were at that game, and to have them tell you what was going on. But the testimony of the players was that these dealers definitely cut the pot, and the reason they were cutting the pot, according to the players, was the more you play, the faster you play, in a half-hour shift, the more money goes into that box. And, of course, the Defendants propounded the theory that, well, it was just to keep all the money straight and so forth and so on. But that's another factual dispute you will have to decide . . . So I think it's pretty obvious, ladies and gentlemen, that this was an illegal game." (App. 35a-36a)

On November 17, 1978, the Jury returned a verdict of guilty against Harold Thornberry, Harry Seiter, Brown Noel and Howard Donnelly. On November 20, 1978, Harold Thornberry was sentenced to five years imprisonment. On February 27, 1978, the first two Counts of the Indictment were dismissed upon request of the United States. Thornberry timely appealed his Judgment and sentence on Count Three to the Sixth Circuit Court of Appeals on the grounds, among others, that it was improper for the Government to call witnesses for the sole purpose of having them invoke their Fifth Amendment privilege before the Jury and that it was improper for the Prosecutor to argue that inferences in his favor arose from those assertions of privilege. A panel of that Court ruled, pursuant to established Sixth Circuit case law, that when the Government has the following: (1) an honest belief that a witness has information which is non-cumulative and is pertinent to the issues in the case; and (2) that information is admissible under applicable rules of evidence (if no privilege is claimed), then the Government may call wit-

nesses for the sole purpose of informing the Jury of the fact they are asserting their privilege. They also ruled that the Prosecutor's closing argument was not "so egregious as to render the entire trial fundamentally unfair." (App. 6a)

Harold Thornberry now seeks certiorari to review these decisions of a panel of the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE DECISION OF A FEDERAL QUESTION BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN NAMET v. UNITED STATES, 373 U.S. 179 (1963); DOUGLAS v. ALABAMA, 380 U.S. 415 (1965); GRIFFIN v. CALIFORNIA, 380 U.S. 609 (1965), CARTER v. KENTUCKY, (1981) NO. 80-5060, — U.S. —, 28 CrL 3093, SUPREME COURT STANDARD 513(a), (b), AND IS ALSO IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

ARGUMENT

In *Namet* v. *United States,* 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963), this Court articulated two principles on which a prosecution witness's invocation of the *Fifth Amendment* privilege before a Jury may constitute reversible error:

1. "Prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build

its case out of inferences arising from the use of the testimonial privilege" and

2. When "in the circumstances of a given case, inferences from a witness's refusal to answer added crucial weight to the prosecution's case in a form not subject to cross examination . . ." 373 U.S. at 186-87, 83 S.Ct. at 1155, 10 L.Ed.2d at 283-84.

In *Douglas* v. *Alabama,* 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965), these principles were given constitutional significance under the Due Process Clause of the *Fifth Amendment* and the Confrontation Clause of the *Sixth Amendment* and were made applicable to the States under the *Fourteenth Amendment.* See 380 U.S. at 419-20, 85 S. Ct. 1074, citing *Namet.*

Namet involved a gambling tax prosecution in which a Federal prosecutor subpoenaed and then produced as witnesses at trial two co-defendants of Namet who had plead guilty earlier that day. Namet's counsel, who also represented both co-defendants, approached the Bench before the witnesses were called to inform the Court that he believed both witnesses were entitled to assert their *Fifth Amendment* privilege, despite their pleas. The Court reserved on the question of waiver of the privilege until the witnesses actually asserted it. When the first witness did, in fact, assert her privilege, the Prosecutor challenged it and the Court ruled that her plea had waived any privilege with respect to testimony about her own gambling activities and ordered her to answer questions on that subject. The Court also ruled that the privilege was available with respect to the witness's dealings with third parties. Joint counsel apparently acceded to the Court's decision once a means was established by which he could direct the witness when to assert the privilege. Under this arrangement, both co-defendants testified extensively to non-privileged

but material facts and, in the course of that testimony, successfully asserted their privilege before the Jury to a few of the questions asked. Defense counsel argued from portions of the witnesses' non-privileged testimony in his closing.

In light of this fact situation, this Court found no inference of prosecutorial misconduct since Namet's prosecutor apparently called both witnesses in the good faith belief that: (1) any assertion of privilege was challengeable under legal precedent which existed at that time; (2) both witnesses would testify to non-privileged facts which were a necessary part of his proof and did so testify, and (3) the Defendant's counsel failed to object on Namet's behalf but in many instances actually acquiesced in the procedure once the rights of the witnesses were secured. *Namet* (supra) 373 U.S. at 188-189, 10 L.Ed.2d at 284-285. This Court also failed to find that inferences from the witnesses' refusal to testify added critical weight to the prosecution's case against Namet in a form not subject to cross-examination since (1) all possible inferences also could permissibly be drawn from these witnesses' non-privileged testimony and had been well established by that testimony, and (2) the effect of those questions which provoked valid assertions of privilege was minimized by the witnesses' lengthy non-privileged testimony and apparently by the weight of other evidence of the Defendant's guilt. *Namet* (supra) 373 U.S. at 189, 10 L. Ed.2d at 285.

In *Douglas* v. *Alabama* (supra), 380 U.S. 415, this Court reversed a State conviction in which a prosecutor, after it became clear that a co-defendant/witness would invoke his privilege to remain silent to all questions, read that witness's previous confession while pausing repeatedly to ask the witness whether he had made the statement. Since portions of that confession implicated the Defendant on

trial, this Court held that the inferences from the witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross examination and thereby prejudiced Douglas under the second principle of *Namet*. *Douglas* v. *Alabama* (supra), 380 U.S. at 420, 13 L.Ed.2d at 938.

With the exception of the Sixth Circuit, the Federal Courts of Appeal have uniformly held it to be improper for either a prosecutor or defense counsel to intentionally call a witness when it is known in advance that the witness will assert a valid Fifth Amendment privilege to refuse to testify as to virtually all questions asked and the sole purpose of calling that witness is to impress upon the Jury the inferences arising from its assertion. *Bowles* v. *United States* (CADC en banc, 1970) 439 F.2d 536 at 541-542; *United States* v. *Reese*, (CADC, 1977) 561 F.2d 894 at 899-900; *Fletcher* v. *United States*, (CADC, 1964) 332 F.2d 724 at 726-727; *United States* v. *Johnson*, (CA1, 1973) 488 F.2d 1206 at 1211; *United States* v. *Maloney*, (CA2, 1959) 262 F.2d 535, cited with approval in *Namet* (supra); *United States* v. *Tucker*, (CA3, 1959) 267 F.2d 212 at 214, cited with approval in *Namet* (supra); *United States* v. *Beechum*, (CA5, 1978) 582 F.2d 898 at 909; *United States* v. *Ritz*, (CA5, 1977) 548 F.2d 510 at 519-520; *San Fratello* v. *United States*, (CA5, 1965) 340 F.2d 560, 565; *United States* v. *Harris*, (CA7, 1976) 542 F.2d 1283 at 1298; *United States* v. *King*, (CA8, 1972) 461 F.2d 53 at 57; *United States* v. *Roberts*, (CA9, 1974) 503 F.2d 598 at 600; *United States* v. *Marten* (CA10, 1975) 526 F.2d 485 at 487; *United States* v. *Coppolla* (CA10, 1973) 479 F.2d 1153.

The American Bar Association Project on Standards of Criminal Justice: *Standards Relating to the Prosecution* § 5.7 (c), reflect these cases in clearly stating:

> "It is unprofessional conduct for a prosecutor to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege."

Similarly, *Supreme Court Standard 513(b)*, a standard having utility on the law of privileges to be applied in Federal Courts, reflects these cases by stating:

> "(b) *Claiming Privilege without knowledge of jury.* — In Jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury."

See *Weinstein's Evidence*, Vol. 2 at 513-1 (1980).

The Sixth Circuit rule differs from all of the above authority in holding that a Federal prosecutor may call a witness whom he knows will assert a valid privilege under the Fifth Amendment to virtually all questions and may then force invocation of this privilege before the Jury if that prosecutor (1) believes the witness possesses information which would otherwise be relevant and admissible evidence; (2) asks relevant questions when forcing assertion of the privilege before the Jury, and (3) claims his case would be seriously prejudiced by a failure to offer that witness. *United States* v. *Compton*, 365 F.2d 1, (CA6, 1966) cert. denied, 385 U.S. 956; *United States* v. *Kilpatrick*, (CA6, 1973) 477 F.2d 357 at 360; *United States* v. *Vandetti*, (CA6, 1980) 623 F.2d 1144 at 1147.

Applying their rule to Harold Thornberry's case, the Sixth Circuit found no error or evidence of prosecutorial misconduct (App. 5a, 6a) even though the record revealed the following facts surrounding the prosecution's use of the witnesses, Soden, Chalk, Messer and Rue:

1) The prosecutor knew in advance that all four witnesses would assert their *Fifth Amendment*

privileges to all questions asked and stipulated to that fact as to three of these witnesses. The fourth witness had asserted his privilege and had indicated his intention to assert it to all questions in a hearing outside of the Jury's presence. (App. 10a-13a)

2) The Prosecutor never challenged the validity of the witnesses' assertion of privilege.

3) The Prosecutor never sought non-privileged testimony from any of these witnesses.

4) The Prosecutor had not obtained immunity for any of these witnesses under *18 U.S.C. § 6003*.

5) The Prosecutor's only expressed purpose in calling these witnesses was to have them invoke the privilege before the Jury, which he claimed was his "duty" under previous Sixth Circuit Opinions. (App. 16a)

6) The Prosecutor had, apparently, interviewed none of the witnesses, all of whom were Co-Defendants who were awaiting trial for conspiracy and the operation of an illegal gambling business under separate counts of the same Indictment. (App. 20a)

7) The entire procedure was strenuously and continuously objected to by defense counsel at Bench conferences and in a hearing outside the Jury's presence before any of these witnesses were called. (App. 9a, 10a, 11a, 14a, 16a, 17a, 19a, 20a, 21a, 22a, 23a, 26a, 28a, 33a)

8) In closing argument, the Prosecutor commented upon the assertion of privilege by these witnesses and argued that it supported inferences in the Government's favor by stating:

"You get to the dealers. Now the United States brought these dealers in here and put them on the

> stand. But we didn't get anything out of them. And you are not to infer, you know, that there is anything against the Defendants. But we wanted to put all the people on that we could that were at that game, and to have them tell you what was going on. But the testimony of the players was that these dealers definitely cut the pot, and the reason that they were cutting the pot, according to the players, was the more you play, the faster you play, in a half-hour shift, the more money goes into that box. And, of course, the Defendants propounded the theory that, well, it was just to keep all the money straight and so forth and so on. But that's another factual dispute you will have to decide . . . So I think it's pretty obvious, ladies and gentlemen, that this was an illegal game." (App. 35a, 36a).

In *Griffin* v. *California*, 380 U.S. 609 at 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), this Court ruled that any prosecutorial comment regarding an assertion of the privilege against self-incrimination by a Defendant violates the Fifth Amendment to the Constitution. Recently, in *Carter* v. *Kentucky* (Dec'd March 9, 1981) No. 80-5060, 28 CrL 3093 — U.S. —, this Court further relied upon its decision in *Griffin* by holding that the Fifth Amendment privilege against self-incrimination requires a state trial judge, upon proper request, to give an instruction that will minimize the danger that the Jury will give evidentiary weight to the Defendant's failure to testify and stated:

> "The Constitution further guarantees that no adverse inferences are to be drawn from exercise of that [the Fifth Amendment] privilege." *Carter* v. *Kentucky*, — U.S. —, 28 CrL Rpt. 3098 (1981).

While this Court has never specifically ruled upon the issue of whether or not prosecutorial comment regarding the assertions of privilege by a witness may constitute reversible

error, it has promulgated Supreme Court Standard 513 (a), which states:

> *"a) Comment or inference not permitted.* — The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not proper subject of comment by judge or counsel. No inference may be drawn therefrom."

See *Weinstein's Evidence,* Vol. 2 at 513-1 (1980).

In his argument to the Jury, this Federal Prosecutor was attempting to make the Jury draw the following inferences from the witnesses' assertions of privilege:

> 1) That the United States was in possession of information regarding those persons' testimony which was not presented to the Jury because of their refusal to testify;
>
> 2) That the Government called these witnesses because they would have testified adversely to the Defendants if the privilege had not been invoked; and
>
> 3) That the witnesses' fear of incrimination reflected acknowledgment that they had participated, as dealers, in an illegal gambling business.

Such adverse inferences cannot properly be drawn by either side from a witnesses' complete refusal to testify on the grounds of a valid privilege. See *United States* v. *Williams,* (CA8, 1972) 464 F.2d 927 at 930; *United States* v. *Maloney* (supra) 262 F.2d at 537; *United States* v. *Johnson* (supra) 488 F.2d 1211; *United States* v. *Atnip* (CA7, 1967) 374 F.2d 720 at 722. This prosecutor's closing argument reflected a conscious attempt to use such inferences to build his case upon a situation which he had intentionally created and which had no value as evidence in his case. Such conduct is in direct contravention of

this Court's decision in *United States* v. *Namet,* (supra) 373 U.S. at 186.

Certiorari is requested to review the use in this case of what has now become a regular and extremely unfair trial tactic of certain Federal prosecutors under the jurisdiction and supervision of the United States Court of Appeals for the Sixth Circuit.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

EXHIBIT A

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF KENTUCKY
COVINGTON

Docket No. 78-26

UNITED STATES OF AMERICA

vs.

HAROLD ANCLE THORNBERRY

JUDGMENT AND PROBATION/COMMITMENT ORDER

* * *

In the presence of the attorney for the government the defendant appeared in person on this date – November 20, 1978

* * *

X WITH COUNSEL – WILLIAM OLDFIELD

* * *

There being a verdict of X GUILTY AS TO COUNT 3.

Defendant has been convicted as charged of the offense of Conspiring to obstruct enforcement of criminal laws of State of Kentucky with intent to facilitate an illegal gambling business in violation of Title 18, Section 1511, United States Code.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

COUNT 3 – FIVE (5) YEARS IMPRISONMENT

A presentence report was submitted to the Court before imposition of sentence and copies of the report were furnished counsel pursuant to Rule 32, F.R.Cr.P.

* * *

/s/ EUGENE K. SILER, JR., JUDGE

* * *

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 78-5508, 78-5509, 78-5510, 78-5511, 80-5048

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD ANCLE THORNBERRY (78-5508, 80-5048),
HARRY NORMAN SEITER (78-5509, 80-5048),
HAROLD NEWTON DONNELLY (78-5510, 80-5048),
BROWN MARTIN NOEL (78-5511, 80-5048),

Defendants-Appellants.

ORDER

(Filed February 24, 1981)

BEFORE: LIVELY, BROWN and JONES, Circuit Judges.

Brown Martin Noel, Harold Newton Donnelly, Harold Ancle Thornberry, and Harry Norman Seiter appeal their convictions for conspiring to obstruct enforcement of criminal laws of the Commonwealth of Kentucky with intent to facilitate an illegal gambling business in violation of 18 U.S.C. § 1511.

From January 1977 until March 23, 1978, a nightly poker game was played at 616 Washington Street. The apartment

was owned by Thornberry and rented to Noel's wife. Many different people gambled in the game. The windows of the apartment were boarded over and the door had a peephole to examine the entrants. Poker was played with a two-dollar opener and a two-dollar limit on raises.

The game had a regular dealer who did not play in the game. Two or three dealers worked in shifts each evening. Noel or Brown answered the door and telephone and prepared food and beverages for the players. One player testified that Donnelly told him the game was protected and wouldn't get raided without his getting a warning.

During the game, quarters would be cut from the pot and placed in a cigar box by the dealer. The average pot was $40.00 to $100.00; the percentage cut was up to 15 percent. The pots were cut for the benefit of Noel and Donnelly, which makes the game illegal under state law.

The Chief of Detectives in Covington is in charge of gambling investigations. In January 1978, Harry Seiter was promoted to Chief of Detectives.

Seiter used his position as Chief of Detectives to warn the other defendants of investigations and close down competing games. He received payoffs in return. Two witnesses testified about this.

Jerome Wardia testified that Donnelly told a group of people that he sent Seiter to close down a competing card game. He also testified that Donnelly told him he was paying Seiter $100.00 to "keep the heat off" and that he saw Donnelly give Seiter $100.00 in cash.

Phillip Pointer testified that he saw Seiter and Donnelly together and that Seiter put a large wad of money in his pocket and said "the boys will be happy with this." He also testified that he saw Donnelly hand Thornberry some large bills.

James Thomas, a paid FBI informant, testified and pre-

sented tape recordings he made of conversations with Thornberry. Thomas testified that in March 1978, Thornberry said he had the Police Department in his pocket, that he would get Harry Seiter made Police Chief, that he had paid for promotions of unnamed Covington police and fire officers, that he had gotten the Commissioners elected and that he had gotten Seiter promoted to Captain. Thornberry said that Donnelly and Noel were paying him $450.00, in addition to his rent, which he used to pay off the Commissioners plus three policemen.

In March 1978, the FBI placed informants in the game. The Chief of Police was told about this, but Seiter, then newly promoted as Chief of Detectives, was not informed.

On March 30, 1978, the FBI and Covington Police searched 616 Washington Street. They had a search warrant. Before the search they asked Thornberry for a key, but he said he didn't have one. After the search the agents took the return on the warrant to Thornberry, who said he would give it to Mary Ann Noel.

Seiter was not informed of the raid until it was over, when he went to meet with Thornberry. Thornberry told Seiter about the raid and that he had been subpoenaed and had to appear before the federal grand jury.

The United States charged the defendants with conspiring to obstruct enforcement of the criminal laws of the Commonwealth of Kentucky. After a five-week trial, all the defendants were convicted.

In this appeal, the defendants contend that the district court erred in permitting the Government to call the card game's dealers to the stand knowing they intended to invoke their Fifth Amendment privilege. The district court noted that if the dealers testified their testimony would not be wholly cumulative and that the jury might wonder why the dealers were not called. In this case, the

Government had "an honest belief that the witness[es] [had] information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed." *United States* v. *Compton*, 365 F.2d 1, 5 (6th Cir.) *cert. denied* 385 U.S. 956 (1966); *see also, United States* v. *Vandetti*, 623 F.2d 1144 (6th Cir. 1980). There was no error here.

The defendants assert that the district court erred because it did not answer the jury's question about Captain Al Meyer's cause of death. Nothing in the record revealed how Meyer died. The court instructed the jury:

> The second, well, actually the first question asked, that is, 'If at all possible we would like to know when and how Captain Al Meyer died.' I want to advise you that that is not in the record in this case and, therefore, you are not to speculate on whether and how he did die. It has not been put into evidence and so Instruction No. 3, which I gave to you, in your instructions you have, is that, 'You are to decide this case solely on the evidence submitted here in court.' And that's all that we can advise you of on that.

This instruction was proper and the defendants were not prejudiced by the court's response.

The prosecutor's closing argument was not "so egregious so as to render the entire trial fundamentally unfair." *Cook* v. *Bordenkircher*, 602 F.2d 117, 119 (6th Cir. 1979). The defendants' assertions that prejudicial statements made by the prosecutor amounted to reversible error are without merit given the overall tone of the advocacy.

We have examined the other contentions made by the defendants in this appeal from their convictions and find they are without merit.

The district court did not abuse its discretion in denying the defendants' motion for a new trial. It heard the

evidence and concluded that it was "not reasonably well satisfied that the testimony given at trial by Wardia was false."

AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 78-5510, 78-5511, 80-5048

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HOWARD NEWTON DONNELLY (78-5510, 80-5048),
BROWN MARTIN NOEL (78-5511, 80-5048),

Defendants-Appellants.

ORDER

(Filed April 1, 1981)

BEFORE: LIVELY, BROWN and JONES, Circuit Judges.

Upon consideration, the Court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of the appeal. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

EXHIBIT D

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

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* * *

[948] All right, you may call another witness.

MR. AREHART: Call Fred Messer.

MR. OLDFIELD: Can we approach the bench, your Honor?

THE COURT: Yes, you may.

(The following occurred at the bench in the immediate presence of counsel and the Court:)

MR. OLDFIELD: Your Honor, I don't [949] know whether my information is absolutely correct, but I have information that this witness is going to take the Fifth Amendment. If that is correct, I would request permission to voir dire the witness outside of the presence of the jury and ask him if that is correct and not have him put on the witness stand in front of the jury.

MR. COBB: He has got an attorney here, too, Mr. Schaffner.

MR. PARRY: He is advised that all four of the defendants in Count 1, the additional defendants, will take the Fifth Amendment.

THE COURT: All right. I guess we had better have Mr. Schaffner come up.

MR. AREHART: I will have to go back to the *Hoffa* case. There they called 20 witnesses that took the Fifth.

(Mr. Schaffner approached the bench.)

THE COURT: All right, Mr. Schaffner, is this your client?

MR. SCHAFFNER: Yes, Your Honor.

THE COURT: Tell us what he will raise. Is it his intention to raise the Fifth?

MR. SCHAFFNER: He is going to take the Fifth Amendment, Your Honor. After I discuss [950] the matter with him, he said he wished to do that. This would be Mr. Soden and the other individuals also.

THE COURT: Do you want to take him on voir dire?

MR. OLDFIELD: Well, if that is sufficient, I object to putting a witness up in front of the jury. If the Court is going to sustain that position, I don't need to. But if the Court is going to overrule it, I need to put him on and get it right from the witness's mouth.

MR. AREHART: I believe the *Compton* case, a Sixth Circuit case, and the *Hoffa* case, — I will have to look it up, because I didn't anticipate this because when I asked Mr. Schaffner on six other occasions, he said he didn't know, they might testify or might not. He said they will probably get up there and tell the truth, so I did not anticipate that they were going to take the Fifth until half an hour ago, when he told me that. That's why I don't have the cases, but I believe this has been before the Court in the last trial you had up in Covington, the *Riddle* case, and we take the same position, that if he is going to take the Fifth, that we be allowed to ask him his name [951] and ask him if he knows the defendant and if he communicates he is going to take the Fifth, we will stop at that point.

MR. OLDFIELD: Your Honor, there is a case — and I can't recall the name of it — I think I have it in my file, Supreme Court case, decided some years ago, within the last ten years, that indicates that when it is made clear,

you know, to the United States Attorney and to the Court, prior to the witness's being subpoenaed and going on the witness stand, that it is error to put him in front of the jury solely for the purpose of having him take the Fifth Amendment, because it is obvious what is being done, drawing some inference of guilt from this witness by his taking the Fifth Amendment.

MR. AREHART: Well, we don't know until we ask him.

MR. OLDFIELD: We can ask him on voir dire.

THE COURT: Well, we will excuse the jury and then you can ask him and then we will resolve the legal question, if that's what you want to do, and I will make a decision based on that and give you a chance to look up any authorities you [952] want to.

MR. OLDFIELD: I appreciate that.

(Thereupon the colloquy at the bench ended.)

THE COURT: Now, ladies and gentlemen of the jury, I'm going to let you go back upstairs for a few minutes. Keep in mind the admonitions we have previously given to you. We anticipate that you will be up there for ten minutes or a little longer.

So, Mr. Marshal, you may let the jury go upstairs.

(The jury retired from the courtroom.)

THE COURT: Let the record show all jurors are out of the courtroom.

All right, let Mr. Messer be sworn and take the stand.

Fred Edward Messer,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

THE COURT: All right, Mr. Arehart, you may question the witness.

Let the record show his counsel, Mr. Schaffner, is in the courtroom.

DIRECT EXAMINATION

[953] BY MR. AREHART:

Q. State your name, sir.

A. Fred Edward Messer.

Q. Where do you live?

A. I take the Fifth. I refuse to answer any questions on the grounds it may incriminate me.

MR. AREHART: If your Honor please, I would ask that he be compelled to answer where he lives. I don't believe that is a statement against self-incrimination.

THE COURT: Well, it might tend to be, so I will allow him to assert that privilege. There is always some question about where he lives, although he may have waived it by signing a bond in this case, but anyway, I won't require him to answer that.

Q. Are you also known by the name "Fat Freddy"?

A. I refuse to answer any questions on the grounds it may incriminate me.

Q. Do you know a man by the name of Howard Donnelly?

A. I refuse to answer the question on the grounds that it may incriminate me.

Q. Brownie Noel?

A. I refuse to answer the questions on the grounds that it may incriminate me.

[954] Q. Harold Thornberry?

A. I refuse to answer the question on the grounds that it may incriminate me.

Q. Harry Seiter?

A. I refuse to answer the question on the grounds that it may incriminate me.

Q. Will you tell us the date you were born?

A. I refuse to answer on the grounds that it may incriminate me.

THE COURT: Well, I think you will be required to answer that.

A. August 31, 1944.

MR. AREHART: That's all I have, your Honor.

THE COURT: All right. Any other counsel want to ask any questions? All right, you may step down temporarily, Mr. Messer.

All right, Mr. Oldfield, have you found your case?

MR. OLDFIELD: No, your Honor, not at this point, but I –

THE COURT: All right, we will call a recess at this point and I will look at the cases cited by the United States. If you find yours in the meantime, you can send it in to my [955] office.

MR. OLDFIELD: Do you want to put the other witnesses on for purposes of voir dire at this point, that the Court has been advised will take the Fifth and find out if that is a fact? I don't know.

MR. AREHART: I think the statement of their attorney will be sufficient. I will stipulate to it.

MR. OLDFIELD: Fine. We will save time.

THE COURT: Mr. Schaffner, is that correct, your other clients would do the same?

MR. SCHAFFNER: Yes, sir.

THE COURT: If there is no contention about it, we

can accept for purposes of the motion to exclude that all the rest would, in fact, take the Fifth Amendment, so I can rule on it based upon that.

All right, Mr. Marshal, you may declare a recess of the court until 3:30 this afternoon.

(The court recessed until 3:30 P.M., at which time the following occurred:)

THE COURT: All right, let the record show all defendants and all counsel are [956] present. No jurors are present.

All right, gentlemen, have you gotten any further authority or want to state anything else about this issue?

MR. OLDFIELD: Your Honor, I apologize to the Court. The case I referred to, for the life of me, I cannot remember. I called my office and I can't find it in the other case file. It was in the case I think of *United States* v. *Riddle,* and I ran across it in my research and put a notation in the file but our secretary hasn't figured out my organization and hasn't found it, but they said they would call me back. I believe Mr. Parry found one case out of the Ninth Circuit. Is that correct?

MR. PARRY: Yes.

MR. OLDFIELD: The case authority that the United States is relying on, I believe in the Riddle case they claimed that they had no way of knowing what the witness was going to do until the witness actually testified. In the *Riddle* case, quite frankly, it did not dawn on me or other counsel that the witness be placed under oath and be voir dired, and in this case he has been placed under oath and said that he would. So now [957] I do not believe the United States can rely on the *Caldwell* case, because the United States does know, in fact, what the witness is going to do, has been told under oath what the witness is going to do, and I don't see what the United

States hopes to derive from the witness. You know, the only thing the United States can hope to derive from this witness is some inference of guilt by these people taking the Fifth Amendment, and clearly, your Honor, that is not acceptable. There should be no inference of guilt taken from that. There should be no inference whatsoever, a witness's refusal to testify, and I can see no proof that the United States would in any way hope to derive.

THE COURT: All right, any other defense counsel want to say anything?

Mr. Arehart, what do you say in response to his statement?

MR. AREHART: If your Honor please, I think we did, as I recall, take one or two of the witnesses in the *Riddle* case outside the presence of the jury. In any event, no one attorney approached the bench and advised that he was going to take the Fifth, and I had to put a statement in there that I had information that the witness [958] did have information relative to this trial, and I think the same thing is clear from here. From the testimony it is obvious to the Court that each of these witnesses has information which would be relevant to this trial, and I think we do not have to be bound by some representations of anybody until he is actually placed under oath in front of the jury. Because he is under oath outside of the jury, I think when the rules were rewritten, the rules of evidence, such as impeaching your own witnesses, they said that each party takes a witness as he is. You can impeach your own witness. Now, what we're trying to do is not impeach them, but I'm just relying on that, saying the rules, when they wrote that rule, they said you cannot anticipate what a witness is going to do until he does it in front of a jury, regardless of what he has done some other time, and that's why they say that you can impeach

your own witness. And we rely on the same thing here. Until he does it – I think we have a responsibility to call these people. They have, in fact, been mentioned throughout this trial and the jury I think has a right to have these witnesses called and let them assert their privilege and get them out. I think I owe that [959] duty to them. In fact, I think one of these cases holds that we have a duty and responsibility to put a witness on if they have information, even if I think they're going to take the Fifth.

THE COURT: There is a real conflict in what the parties have cited here.

Mr. Slukich, do you want to say anything?

MR. SLUKICH: I just like to get up every now and then. The only think I would add relative to Mr. Arehart's position is that, number one, the individuals that he seeks to call are indicted, arising out of the transactions with all these gentlemen. They are defendants in a case and it will at least be my thinking or my position that that anticipation of calling a defendant who is jointly indicted with all these defendants in a conspiracy charge, I would anticipate and I would have the greater position of knowing that they would assert the Fifth, and my seeking to bring them on as a witness and my duties and responsibilities, as everybody espoused here, I would know that I am not going to get anything out of those people, because down the road they're going to have to involve themselves in a trial, present evidence, if any, in their own defense.

[960] THE COURT: Well, that does make it slightly different there. They are codefendants in a separate case with these defendants. There is no question about that.

Anybody else want to say anything?

MR. VINCENT: Just to join in the remarks made by Mr. Oldfield and Mr. Slukich, Judge, that this indictment, the first two counts are filed pending against at least this witness here and the other three that are supposed to be called, and to require them to even go through the appearance before a jury is also not only detrimental to them, but to require them to take the Fifth in front of the jury reflects back on the people here who are supposed to be the boss of the game.

I mean there has been some testimony that the present defendants — or some of them — it's their game, that they run the game, and that these other people were paid, the ones that are going to testify, were paid by these people; and to require them to take the Fifth in front of this jury would certainly look like they were being put up to it by these defendants, and also the remarks made by Mr. Slukich that they are not potential defendants, they are defendants in this same transaction.

[961] THE COURT: Well, of course the jury doesn't know that, but from a legal standpoint that's correct.

Gentlemen, there is only one way as far as I can see to resolve the question. I think there is a direct conflict here in the Circuits. The defendants have cited a later case, which is *U. S.* v. *Roberts*, 503 F.2d 591, where the Court said the government may not call a witness knowing he will refuse to testify. It does not cite any authority for that, but states it just as a principle. In that case the exact facts of that were, however, that one defendant wanted to call a codefendant and the Court would not allow that to occur. It was a codefendant who had previously pleaded guilty and the Court held it was not error for the District Court not to require that that witness take the stand and testify.

Now, against that are a couple of cases out of the Sixth

Circuit, which to my knowledge have not been overruled in any way, and that is one of the cases cited by the United States. It is *U. S.* v. *Compton*, 365 F. 2d 1, in 1966, and *certiorari* was denied. And it cites a previous case of *U. S.* v. *Terry*, 362 F. 2d 914.

[962] In the Compton case there were three judges on that panel who are still on the Sixth Circuit and Judge Cecil, writing for the majority, did reverse it but reversed it on a question which was all-inclusive asked by the United States, but the Court there said that government counsel need not refrain from calling a witness whose attorney appears in Court and advises Court and counsel that the witness will claim and his privilege and will not testify. And it says counsel must have an honest belief that the witness has information which is pertinent to the issue in the case and which is admissible under applicable rules of evidence if no privilege were claimed.

Now, the other case, the *Terry* case, it's slightly different, and in that case the Judge, the District Court, was requested to conduct a separate hearing and make the government make a record of a question it was going to ask and the trial Judge there declared he couldn't determine whether the privilege was proper until it was made in front of the jury. I think those cases are close enough where the United States can produce the witnesses who are codefendants, can ask them certain limited questions. Although I let Mr. Messer raise the [963] Fifth Amendment on his address, according to *U. S.* v. *Compton* he can't raise it on the address. So I'm going to advise him he is going to have to answer that question and he can be asked his name, address, age, and you may ask him if you desire — you don't have to ask him these questions — you may ask him if he knows any of the codefendants and then ask him if asked further questions he would assert his rights

under the Fifth Amendment. I think I will limit it to those questions unless you think of anything else that should be asked.

Yes, Mr. Cobb.

MR. COBB: While the discussion was going on, I located two additional cases in U. S. C., in the annotations. They are both 1973 cases and they both say where the prosecutor knew in advance that the two witnesses whom it planned to call would invoke the privilege against self-incrimination and refuse to testify, calling the witness was improper and prejudicial.

THE COURT: What circuit?

MR. COBB: They are both – there was a Pennsylvania case reported in 307 *Atlantic* 2d, page 229. That is the *Commonwealth* v. *Duval,* and the other case is a Colorado case, *People* v. [964] *Scheidt,* 513 Pacific 2d 446. There are these two additional ones that seem to stand for this proposition.

THE COURT: Well, you don't need to show them to me because I think the Sixth Circuit is in contradiction to the Ninth and, for example, in contradiction to those state cases, and I think the rule is still clear and I will permit these questions to be asked.

MR. PARRY: I don't know whether I put it on the record yet, but on behalf of the Defendant Seiter we would object to this and also object to the questions that the Court is allowing the prosecution to ask.

THE COURT: I think in a way the jury has a right to wonder why witnesses are not called and I will instruct the jury if you gentlemen desire it, that the privilege under the Fifth Amendment to the Constitution is a personal one and it may be raised only by the person to whom the question is asked and they may not infer any-

thing against any of the defendants or against anyone else by virtue of that privilege.

Do you want that admonition, gentlemen?

MR. PARRY: Your Honor, in lieu of [965] calling the witnesses in here and letting them do that, we will on behalf of the Defendant Seiter request that the Court tell the jury that these four witnesses are not being called by the prosecution because they would take the Fifth Amendment and wouldn't testify to anything except their name and address. That explains to the jury Mr. Arehart's concern, why he didn't call them.

THE COURT: What do you other gentlemen say about that?

MR. OLDFIELD: I would rather have half the bite of the apple than none at all. I would rather have that than have these four people stand up and take the Fifth Amendment in front of this jury, your Honor. It can only be done for the purpose of inflicting some prejudice against these four defendants. It can serve no other purpose. Mr. Arehart doesn't have any interview sheet with him. They haven't talked to him, they haven't told him anything, they haven't waived their privilege. He has been told by the witness's mouth that they are going to take the Fifth Amendment. It serves no purpose. It is done solely for the purpose of prejudice.

THE COURT: Mr. Slukich, what do [966] you say?

MR. SLUKICH: If the Court is indicating to us that it is going to instruct the U. S. Attorney to ask the name, address and age, I think that would be sufficient. Any consideration or any questioning regarding the knowledge of any of these defendants is getting into evidence by inference that which they could not do, since that individual was asked or asserted the privilege. I think I have no disagreement with the Court's instructions that the United

States Attorney ask the name, age and address, if that's the Court's ruling, but I think anything beyond that creates a mode of answering the various questions that he will propound and present to him. I would object to that, your Honor. Following the Court's ruling — I'm objecting to the process of permitting them to be called, but following the Court's ruling I think it even should be limited with respect to the name, age and address.

THE COURT: What do you say about Mr. Parry's suggestion, Mr. Slukich?

MR. VINCENT: To embellish my brother Oldfield's remarks, if your Honor please, I want to say for the record that I believe Mr. Arehart [967] knows or should know that these particular four witnesses, especially the one who has already advised he wants to take the Fifth, will add no new evidence to his case. We have heard repeatedly over and over again about a poker game, about the cut, about the amount of the cut, this, that any the other, and that's all he could hope to gain out of even examining these witnesses, is corroboration of testimony that the record is full of. In fact, the Court has been very patient to just continue about the cut. I can almost repeat it from memory. But the only other thing he has, he has got them in the game, he has got them dealing and he has got the pot, and I say Mr. Arehart knows what they are going to say or close to it. They don't add anything to his case. He doesn't need them. That's what I want to say.

THE COURT: Well, I think if they were to testify fully, that probably they would add something, based on the other testimony, since they could tell the number of days they came a week and so on. Nobody else seems to know that. There's a lot of it which would, of course, be strictly cumulative to what the other witnesses have said.

[968] All right, Mr. Cobb, did you want to say anything?

MR. COBB: Only, your Honor, that I think the real issue here is not what they would say, but the fact that they have a right to assert the Fifth Amendment. The real issue is that the prosecutor knows that they're going to assert that right. The Court knows it because of the voir dire and because of the representation of Mr. Schaffner, and what I'm saying is that it's prejudicial because, knowing that, then to go ahead and call them in front of the jury, we know — you know, all we know is that there will be an inference and, obviously, this is a matter which raises great questions in all the 12 people's minds. Each of those 12 people may have a different reaction to that, but whatever it is, it's not going to be anything but prejudicial to the defendant. For those reasons we think that is what these cases that I have cited say.

THE COURT: Well, Mr. Slukich, you never did say what your thought was on Mr. Parry's suggestion.

MR. SLUKICH: So long as I'm not waiving my objection, I will go along with it. I still want to preserve my objection to the [969] introduction of any of the witnesses and any information concerning their assertion of their rights to take the Fifth Amendment. I do not desire to waive that. If the Court — as far as that suggestion, I would be amenable to that, as opposed to calling them for the limited purpose of name, address, age, and they are going to take the Fifth, and the Court instructs accordingly.

THE COURT: All right.

MR. COBB: The only further thing, Judge, the Court gives an admonition to the jury to correct something that in effect has gone amiss. Here we have the opportunity by not putting them up there to not have it go amiss or to raise any bad presumption in their minds. Conse-

quently, knowing it ahead of time is the reason we don't call them.

THE COURT: Well, I understand what you're saying, but the jury still may wonder why these persons aren't here, who obviously were right in the place, you know, that the testimony has gone on about.

MR. COBB: For the record we are saying, not to quarrel with you, but we are objecting to the admonishment also because we think it [970] is improper to give the admonishment and unnecessary in view of the fact that the opportunity presents itself not to call them.

THE COURT: Well, if they're put on, though, I won't give the admonishment if you don't want it, of course. If you don't want any admonishment at all, I won't give that. Since there's so much disagreement, what I'll do is I'll let the U. S. call the witness, I'll not allow the asking if they know any of the defendants. You may ask the name, age and address and if asked any questions about this case, if they would assert their rights under the Fifth Amendment. And then if they say they would, that will be the end of it and I will admonish the jury.

MR. PARRY: Your Honor, I want the record to be clear that I did not intend to waive my previous objection by making those suggestions.

THE COURT: I understand.

MR. AREHART: Could I ask them to show the witness their picture that has been introduced and ask them if that's it?

THE COURT: I suppose —

MR. AREHART: They're already in evidence.

[971] THE COURT: Yes, you can let them look at their own pictures. I suppose they can't raise the Fifth Amendment on whether it's themselves.

Mr. Schaffner, what do you say?

MR. SCHAFFNER: Your Honor, I have two small problems. First I object to their being shown a picture and being forced to testify that that is them.

Secondly, I don't want to be seen with either group in this room. I have no objection to Mr. Arehart and defense counsel, but I don't want to prejudice either case and there's no place for me to go except perhaps behind the witness box.

THE COURT: Do you want to sit there or do you want to stand?

MR. SCHAFFNER: No, I don't want to sit in the box with them, but I want to be someplace close to them. I don't want to obstruct the view.

Perhaps if I could get around her desk.

THE COURT: All right, you can do that, or perhaps we can put a chair for you and you can sit by the clerk, if you want to.

MR. SCHAFFNER: That would be fine. [972] As I understand the Court's ruling, you are going to let Mr. Arehart show them the pictures and inquire if that's their likeness in the pictures?

THE COURT: Yes, ask them if that's them, if that is that person. Yes, sir. I don't know any self-incrimination that would cause.

MR. SLUKICH: May I respond, your Honor?

THE COURT: All right.

MR. SLUKICH: There have been a half a dozen people get up here and hold these pictures in their hands and say, "Yeah, that's Fat Freddy, the dealer," or, "This is Chalk, Rodney, the dealer," or, "This is Rue, the dealer," and to permit and to require that individual to say, "Yeah, that's my picture," sure takes that gun and sticks it right up in his head and makes him a dealer and you're taking away his privilege because he puts himself right in

that dealer's chair, right in that jury's minds, and there's no way you can erase that.

THE COURT: Well, it might do that, but I just wonder whether this identification of your own picture is a matter of self-incrimination.

[973] MR. VINCENT: That's what Mr. Slukich is urging on the Court, and I join him, that to require them to do that is compelling them to give testimony against themselves. You've entered the field, you've opened the gate.

THE COURT: All right. I will not allow the U. S. to ask that. I guess the U. S. may argue that and show that to the jury at an appropriate time, that that's the same man that took the stand, so I will just let you ask the other questions.

MR. AREHART: I will ask that the jury be exhibited photographs when these people testify. If I can do it later, there's no reason I can't do it now.

MR. VINCENT: Your Honor, there's a rule of law that has been modified, that when you need a picture to explain some element of the case or some facts in the fact that's necessary to constitute an element, the picture is admissible. But these pictures here serve no purpose except to identify the dealers, and when you ask these witnesses or pass a picture around, the jury has already seen these pictures, and to require the marshal to hand it to the jury with the defendant [974] in the box, that's the same thing as — he can't refute it, he can't say, "That's not me."

THE COURT: Well, I'm not going to allow that question to be asked.

MR. AREHART: It gives the jury an understanding, your Honor, of who we're talking about.

THE COURT: Well, I won't let you have those pic-

tures passed to the jury at this time. I think they have already seen those pictures at one time, and if you show them to them again, I guess it would unduly emphasize that. I think the jury will remember those pictures all right.

So, Mr. Schaffner, you may come up here.

Let the jury come in, Mr. Marshal.

MR. SLUKICH: Just to save a little time, I was going to move for a mistrial, just assuming the Court's ruling, it is overruled, subject to what we will hear in advance, so I won't have to do it later.

THE COURT: All right.

MR. VINCENT: I join in that.

MR. OLDFIELD: Likewise.

MR. AREHART: So I get the ruling [975] straight, your Honor, I can ask the witness his name, address, age, et cetera, if he intends to rely on his privilege of self-incrimination as to any question that might be asked to him concerning this case and these four defendants —

THE COURT: Yes, I think that's —

MR. AREHART: (Continuing)

— without naming them, just the defendants on trial or the four defendants?

THE COURT: Yes, this case, any question pertaining to this case.

MR. AREHART: I want to be sure that we're talking about this trial here.

THE COURT: Yes, this case.

All right, let the jury come in.

(The jury returned into the courtroom and resumed its place in the jury box.)

THE COURT: Let the record show all jurors are present.

Let Mr. Messer come back on the stand.

He hasn't been sworn, has he?
THE CLERK: Yes.

Fred Edward Messer, resuming

DIRECT EXAMINATION

BY MR. AREHART:

[976] Q. Will you state your name, sir?
A. My name is Fred Edward Messer.
Q. Are you also known as "Fat Freddy"?
A. Yes, sir.
Q. Where do you live?
A. 1026 Lee, Covington.
Q. And what is your age?
A. Thirty-four.
Q. I would ask you, sir, if you intend on advice of your attorney to assert your privilege against self-incrimination as to any and all questions I might ask you concerning this case and these defendants?
A. Yes, sir.
MR. SLUKICH: Objection to the question, your Honor.
THE COURT: Well, overruled.
Q. Please?
A. I said yes, sir.
MR. AREHART: That's all, your Honor.
THE COURT: All right.
MR. SLUKICH: I have nothing.
THE COURT: Any questions?
MR. VINCENT: No questions, Judge.
THE COURT: All right, you may step down, Mr. Messer.
[977] MR. SCHAFFNER: May he be finally excused?

THE COURT: Any objection to his being finally excused?

MR. OLDFIELD: None, your Honor.

May we approach the bench?

THE COURT: Yes. Come up.

(The following occurred at the bench in the immediate presence of counsel and the Court:)

MR. OLDFIELD: Your Honor, the Court instructed Mr. Oldfield as to what he should ask, the name, address, age and whether he was going to take the Fifth. Now he went and asked the name and also if he was known as "Fat Freddy" which has nothing to do with it, and the next thing, the language the Court approved was, "whether or not you are going to take the Fifth about anything about this case," and he said, "This case and the defendant's," and the Court excluded that.

MR. AREHART: That's wrong, because I asked the Court if I could ask him this case and the defendant's.

THE COURT: Well, I said just this case. I will sustain the objection, but I think it is synonymous. But the others should only be [978] asked pertaining to this case.

MR. SLUKICH: It was the Court's instruction, and it's in the record and that was the only purpose of my objection.

THE COURT: Yes, but since it's already out and he said yes, there is less harm in leaving than there is to reask the same question and he would say he would take the Fifth Amendment. And when he said this, when he was asked about the defendant, the defendants' names were not put in.

MR. AREHART: Can the Court advise the jury who this man is sitting here?

MR. VINCENT: The defendant Noel renews his motion for a mistrial, your Honor, so the record will be straight.

THE COURT: Let that be overruled.

MR. OLDFIELD: Join in the motion for all.

THE COURT: If you want me to strike the question and have Mr. Messer come back on the stand, I will do that.

MR. OLDFIELD: That doesn't do any good.

MR. AREHART: Can I ask about a nickname?

[979] THE COURT: Well, just ask him if this is his name, what his name is. Don't ask about any nickname.

MR. AREHART: Well, I think half of these witnesses, your Honor, identify these people by nicknames. That's the only way to associate them. One is Big A, which is Alan Rue. That's all they knew him by.

THE COURT: Well, I think they have already identified them by the pictures.

MR. AREHART: Okay. I will abide by the Court's ruling. Thank you.

(Thereupon the colloquy at the bench ended.)

THE COURT: Now, ladies and gentlemen of the jury, the gentleman who is seated here by the front with permission of the Court is an attorney, Charles Schaffner, attorney from Northern Kentucky, and he is the attorney for Mr. Messer and certain others. So he may consult with them. He is not associated in any way with any other counsel on either side in this case.

And I also want to advise you that raising the Fifth Amendment privilege, which Mr. Messer did in this case, is a privilege which is personal to him and only that person can assert such privilege. [980] It is a privilege allowed him under the Constitution, and by virtue of his

raising that privilege, that should not in any way raise any inference of guilt or innocence pertaining to any defendant in this particular case.

Now, are there any additional admonitions anyone wants the Court to give?

All right. This pertains, this admonition pertains to the testimony of any other witness who might come in this case and assert a Fifth Amendment privilege.

All right, you may call another witness, Mr. Arehart.

MR. AREHART: The United States calls Edward Soden.

Edward Soden,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

THE COURT: Mr. Schaffner also represents Mr. Soden, ladies and gentlemen.

DIRECT EXAMINATION

BY MR. AREHART:

Q. Will you state your name, sir?

A. Edward Soden.

Q. And where do you live?

[981] A. 32 West Sixth Street, Covington, Kentucky.

Q. And what is your age?

A. Fifty-six.

Q. Sir, let me ask you if upon the advice of your attorney you intend to rely on your privilege against self-incrimination as to each and every question I might ask you about this case.

A. Yes.

MR. AREHART: That's all the questions I have.

THE COURT: All right, any further questions?

MR. SLUKICH: I have no further questions.
MR. PARRY: I have no questions.
MR. OLDFIELD: I have one question.

CROSS-EXAMINATION

BY MR. OLDFIELD:

Q. Would your answer be the same as to questions I might ask you?

A. Yes.

MR. OLDFIELD: Thank you.

THE COURT: Any other questions by anyone?

All right, you may step down, Mr. Soden.

[982] MR. SCHAFFNER: May he be finally excused?

THE COURT: May he be finally excused, gentlemen?

MR. SLUKICH: Yes.

THE COURT: All right. The same admonition pertains to his testimony as pertains to the testimony of Mr. Messer, ladies and gentlemen.

All right, you may call another.

MR. AREHART: Rodney Chalk.

Rodney Joseph Chalk,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

THE COURT: Mr. Schaffner also represents Mr. Chalk, ladies and gentlemen.

DIRECT EXAMINATION

BY MR. AREHART:

Q. Would you state your name?

A. Rodney Joseph Chalk.

Q. Where do you live?

A. 49 East Tenth Street, Newport.

Q. What is your age, sir?

A. Twenty-eight.

Q. I will ask you, sir, if upon the advice of your [983] attorney that you intend to rely upon your privilege of self-incrimination as to each and every question I might ask you or defense attorneys might ask you about this case?

A. Yes, I do.

MR. AREHART: That's all, your Honor.

THE COURT: Gentlemen?

MR. SLUKICH: No questions, your Honor.

MR. VINCENT: No questions.

MR. OLDFIELD: Nothing for the Defendant Thornberry.

MR. SCHAFFNER: May he be excused?

THE COURT: Yes, he may be.

The same admonition pertains to his testimony as pertains to the testimony of Mr. Messner and Mr. Soden.

You may call another witness for the United States.

MR. AREHART: The United States calls Alan Rue.

Sanford Alan Rue,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AREHART:

[984] Q. Will you state your name, sir?

A. Sanford Alan Rue.

Q. Where do you live?

A. 260 West Seventh Street, Covington, Kentucky.

Q. How old are you, sir?

A. Thirty-six.

Q. Is it your intention, Mr. Rue, to assert the privilege, based upon the advice of your attorney to assert your privilege against self-incrimination as to each and every question I might ask you or defense attorneys might ask you concerning this case?

A. It is.

MR. AREHART: That's all the questions I have.

THE COURT: All right, any questions?

MR. SLUKICH: Nothing, your Honor.

MR. VINCENT: Nothing, your Honor.

MR. OLDFIELD: Nothing, your Honor.

MR. PARRY: No questions.

THE COURT: All right, you may step down, Mr. Rue.

MR. SCHAFFNER: May he be finally excused, your Honor?

THE COURT: All right, any [985] objection to his being finally excused?

MR. SLUKICH: No.

THE COURT: He is also represented by Mr. Schaffner and the same admonition pertains to his testimony as pertains to the testimony of Mr. Messer, Mr. Soden and Mr. Chalk.

You may call another witness for the United States.

MR. VINCENT: Your Honor, may we approach the bench?

THE COURT: All right, come up, gentlemen.

(The following occurred at the bench in the immediate presence of counsel and the Court:)

MR. COBB: If your Honor please, at this time on behalf of the Defendant Thornberry we move to declare a mistrial and set aside the swearing of the jury for the reasons set forth previously, that we feel it is highly pre-

judicial to the rights of the defendant for the prosecutor now having called a total of four witnesses, knowing in advance of calling them that all four of them would take the Fifth Amendment, and for the reasons set forth in the *Roberts* case, the *Sheidt* case and the *Duval* case, which we have [986] previously cited to the Court, we respectfully move the Court to declare a mistrial.

MR. VINCENT: And set aside the swearing of the jury, and we join in it.

MR. PARRY: We join in that motion.

MR. SLUKICH: The Court has previously ruled.

THE COURT: Mr. Arehart?

MR. AREHART: Other than to rely on the ruling in the *Compton* case, which says that I can call a witness knowing he is going to take the Fifth Amendment.

THE COURT: Let the motion to set aside the swearing of the jury be overruled and the motion for a mistrial.

(Thereupon the colloquy at the bench ended.)

* * *

EXCERPT FROM PLAINTIFF'S CLOSING ARGUMENT

* * *

[3529] Now, we have to prove that it lasted for a substantially continuous 30-day period and that there were five or more people involved in running this game. I anticipate that the Court will instruct you that this means all, anybody other than players, who had any hand in this game. It would include dealers, it [3530] would include the cleanup boy, it would include a waitress who served food and, of course, it would include Mr. Donnelly and Mr. Noel, if you believe that they were the operators of this game. And it doesn't have to be, ladies and gentlemen, the same five people for the whole continuous 30 days. It can be five different people, as long as you belive that the defendants were one of those five people during that period. And the defendant himself doesn't have to be there for the whole 30 days, as long as he — the 30 days applies to the business itself, you know, did the game exist for 30 days? And if you get over that hurdle, then you decide whether or not there were five people during those 30 days, whether they were the same five people or not doesn't matter under law.

* * *

[3534] You get to the dealers. Now, the United States brought these dealers in here and put them on the stand. But we didn't get anything out of them. And you are not to infer, you know, that that is anything against the defendants. But we wanted to put all the people on that we could that were at that game and obviously the dealers were at that game, and to have them tell you what was going on. But the testimony of the players was that these dealers definitely cut the pot, and the reason that they were cutting the pot, according to the players, was the

more you play, the faster you play, in a half-hour shift, the more money goes into that box. And, of course, the defendants propounded the theory that, well, it was just to keep all the money straight and so forth and so on. But that's another factual dispute that you will have to [3535] decide. And I think it goes without a doubt that Mr. Donnelly, who, witnesses have testified, had the reputation of being an operator of a game, would be doing this to make money, not to just keep the money straight among the players. Why would he even be there all this time if he didn't have an interest in this? The testimony was that he played very seldom, that he did play but he played very seldom. What was his interest in this game that he would be there for 12 hours a day? So I think it's pretty obvious, ladies and gentlemen, that this game was an illegal game. I don't think there is any way you can get over that.

* * *